No. 2836.

# United States Circuit Court of Appeals for the Ninth Circuit.

GREAT NORTHERN RAILWAY COMPANY, PLAINTIFF IN ERROR,

*vs.*

THE UNITED STATES OF AMERICA, DEFENDANT IN ERROR.

## BRIEF OF DEFENDANT IN ERROR.

*UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.*

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# United States Circuit Court of Appeals for the Ninth Circuit.

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## BRIEF OF DEFENDANT IN ERROR.

### STATEMENT OF CASE.

This case, which has heretofore been before this court (*United States* v. *Great Northern Railway Company*, 229 Fed. 927), is a prosecution in twelve counts under the Safety Appliance Acts (27 Stat. at L. 531; 29 Stat. at L. 85; 32 Stat. at L. 943; 36 Stat. at L. 298).

It now comes before the court on writ of error to the United States District Court for the Eastern District of Washington, Northern Division, for a judgment in favor of the United States against the Great Northern Railway Company in which there was a judgment in favor of the Government of one hundred dollars ($100) on each of the twelve causes of action.

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The material part of the complaint in each cause of action is as follows (Rec. p. 2):

Plaintiff further alleges that on said date said defendant ran said train as aforesaid over its line of railroad from Cascade Tunnel, in the State of Washington, to Merritt, in said State, within the jurisdiction of this court, when its speed was controlled by the brakemen using the common hand brake for that purpose, and when said defendant did then and there require said brakemen to use the common hand brake to control the speed of said train, and when the speed of said train was not controlled by the power or train brakes used and operated by the engineer of the locomotive drawing said train, as required by section 1 of the aforesaid act of March 2, 1893, as amended.

To this complaint defendant demurred, which demurrer was sustained by the District Court, but the judgment entered upon the demurrer was reversed by this court (229 Fed. 927). After the case was remanded the defendant railway company filed its answer (rec., p. 16), the material part of which is as follows :

Said defendant further alleges that each engine upon each of said trains was equipped with a power-driving wheel brake and appliances for operating the train-brake system, and that in each train not less than 85 per cent of the cars therein were equipped with power or train brakes, which were used and operated by the engineer of the locomotive drawing

such train, to control its speed in connection with the hand brakes.

The plaintiff moved for judgment on the pleadings, to which defendant entered seven formal objections (rec., p. 20), setting forth in different form of words its claim that no cause of action in favor of the plaintiff is shown by the pleadings.

The sixth and seventh objections set forth the claim that to allow recovery of judgment against the defendant on account of any of the causes of action alleged in the claim would be contrary to the provisions of article 5 of the amendments of the Constitution of the United States and contrary to the provisions of section 1 of article 14. To the overruling of the objections of the defendant and the granting of the motion of the plaintiff for judgment on the pleadings the defendant excepted. (Rec., p. 22.)

The defendant filed the following assignment of errors (Rec., pp. 26 and 27):

I.

That the United States District Court in and for the Eastern District of Washington, Northern Division, erred in overruling the objection of the defendant to the granting of plaintiff's motion upon the pleadings.

II.

That the said court erred in granting the motion of the plaintiff for judgment in favor of the plaintiff upon the pleadings.

III.

That said court erred in finding that the defendant was guilty of a violation of the act of Congress known as the "Safety Appliance Act," approved March 2, 1893 (contained in 27 Statutes at Large, p. 531), as amended by an act approved April 1, 1896 (contained in 29 Statutes at Large, p. 85), as amended by an act approved March 2, 1903 (contained in 32 Statutes at Large, p. 943), which act is entitled "An act to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes, and their locomotives with driving-wheel brakes, and for other purposes."

IV.

That said court erred in ordering judgment to be entered herein and imposing a fine of one hundred dollars upon each cause of action, and twelve hundred dollars in all upon said defendant.

V.

That the said court erred in ordering and rendering judgment herein in favor of the plaintiff and against the defendant for the sum of twelve hundred dollars, and the plaintiff's costs and disbursements therein.

QUESTIONS INVOLVED.

1. Is there Constitutional Objection to the Validity of the Prohibition in the Statute Against Requiring Brakemen to use the Com-

MON HAND BRAKE FOR THE PURPOSE OF CONTROLLING THE SPEED OF TRAINS?

2. WAS PLAINTIFF ENTITLED TO JUDGMENT ON THE PLEADINGS?

3. DOES THE "LAW OF THE CASE," ESTABLISHED BY THE FORMER JUDGMENT OF THIS COURT, FORBID A RECONSIDERATION OF THE QUESTION CONSIDERED AND DETERMINED BY THIS COURT SO THAT NO ERROR CAN BE ALLEGED IN THE ACTION OF THE COURT BELOW TAKEN IN ACCORD WITH THE MANDATE OF THIS COURT?

## I.

IS THERE CONSTITUTIONAL OBJECTION TO THE VALIDITY OF THE PROHIBITION IN THE STATUTE AGAINST REQUIRING BRAKEMEN TO USE THE COMMON HAND BRAKE FOR THE PURPOSE OF CONTROLLING THE SPEED OF TRAINS?

To the constitutional objections urged against the validity of the requirement of the statute that brakemen shall not be required to go on the top of the cars to operate the hand brakes, it is only necessary to say that this is no violation of the fifth article of amendment to the Constitution, and the first section of article 14 is not applicable to congressional legislation, being in express terms limited to action by the States.

The fifth article is not violated, because legislation under the commerce clause directed in the

interest of the safety of travelers and employees has long been held to be constitutional.

*Southern Railway Co.* v. *United States*, 222 U. S. 20.

*Second Employers Liability Cases*, 223 U. S. 1.

*Wabash R. R. Co.* v. *United States*, 168 Fed. 1.

Legislation coming within the scope of regulation of commerce among the States is not impaired by the due process clause of the fifth amendment.

*Chicago, Burlington & Quincy R. R. Co.* v. *McGuire*, 219 U. S., 540.

*Addyston Pipe & Steel Co.* v. *United States*, 175 U. S. 228.

*Patterson* v. *Bark Eudora*, 190 U. S. 174.

*Atlantic Coast Line Co.* v. *Riverside Mills*, 219 U. S. 186.

*Louisville & Nashville Railroad Co.* v. *Mottley*, 210 U. S., 467.

Laws enacted in the exercise of the power to regulate commerce are not violative of property rights protected by the Federal Constitution.

The power of Congress to regulate in the interest of safety the instrumentalities of interstate commerce involves the right to declare the liability which follows the infraction of such regulations as that body may enact.

The due-process clause of the fifth amendment does not restrain the normal exercise of governmental power.

The regulation in the interest of safety made in the safety appliance acts is a normal and constitutional exercise of congressional power.

The power of Congress to regulate interstate commerce "is plenary and competently may be exerted to secure the safety of the persons and property transported therein and of those who are employed in such transportation, no matter what may be the source of the dangers which threaten it." *Southern Ry. Co.* v. *United States*, 222 U. S. 20.

Regulations to promote safety of citizens' lives can not be held to be a taking of "life, liberty, or property" in violation of the due-process clause of the Constitution.

## II.

WAS PLAINTIFF ENTITLED TO JUDGMENT ON THE PLEADINGS?

Judgment on the pleadings was properly rendered in favor of the United States for the reason that there was not set forth in the answer or plea any substantial and issuable defenses to the allegations of the plaintiff's declaration. All the material allegations stated in the declaration were left without denial. The allegations of the answer set forth no defense to the allegations of the declaration. These allegations, standing uncontested and unchallenged, constituted a lawful basis for judgment on the pleadings for the plaintiff.

## III.

DOES THE "LAW OF THE CASE," ESTABLISHED BY THE FORMER JUDGMENT OF THIS COURT, FORBID A RECONSIDERATION OF THE QUESTION CONSIDERED AND DETERMINED BY THIS COURT SO THAT NO ERROR CAN BE ALLEGED IN THE ACTION OF THE COURT BELOW TAKEN IN ACCORD WITH THE MANDATE OF THIS COURT?

On the substantive question of law involved in this case, which the carrier's brief, page 5, speaks of as "the sole question involved," there was no discretion in the court below as to the judgment to be rendered.

The former decision of this court in this case (229 Fed. 927) established the "law of the case," which it became the imperative duty of the district court to obey. When this cause was remanded by this court to the court below for further proceedings it became the duty of the court below in the further proceedings to conform to the opinion laid down by this court.

There can be no error in the district court following the mandate of the Circuit Court of Appeals. The rule as to "the law of the case" is applicable not only to the lower court but to the appellate court itself, when the same question again arises in the same case.

This court in *Mathews* v. *Columbia National Bank*, 100 Fed., at page 397, said:

> In the appellate courts of the United States, and in nearly all, if not all, the appellate courts of the States, a second writ of error,

or a second appeal in the same case, brings up for review the proceedings of the trial court subsequent to the mandate, and does not authorize a reconsideration of any question, either of law or of fact, that was considered and determined on the first appeal or writ of error. *Bridge Co.* v. *Stewart*, 3 How. 413, 425, 11 L. ed. 638; *Sizer* v. *Many*, 16 How. 98, 14 L. ed. 861; *Tyler* v. *Magwire*, 17 Wall. 253, 283, 21 L. ed. 576; *Phelan* v. *City and County of San Francisco*, 20 Cal. 39, 44; *Leese* v. *Clark*, Id. 387, 416, 417. Mr. Justice Field, in the last case, speaking of the reasons for this doctrine, said:

"The Supreme Court has no appellate jurisdiction over its own judgments. It can not review or modify them after the case has once passed, by the issuance of the remittur, from its control. * * * The decision is no longer open for consideration. Whether right or wrong it has become the law of the case. This will not be controverted. * * * It has determined the principles of law which shall govern, and having thus determined, its jurisdiction in that respect is gone.

"*And if a new trial is had in accordance with its decision, no error can be alleged in the action of the court below. Young* v. *Frost*, 1 Md. 394; *McClellan* v. *Crooks*, 7 Gill. 338."

In *Standard Sewing Machine Co.* v. *Leslie*, 118 Fed., at p. 559, Baker, circuit judge, delivering the opinion of the Seventh Circuit Court of Appeals, said:

"* * * it is a familiar and entirely righteous rule that a court of review is pre-

> cluded from agitating the questions that were made, considered, and decided on previous reviews. The former decision furnishes 'the law of the case,' not only to the tribunal to which the cause is remanded, but to the appellate tribunal itself on a subsequent writ of error or appeal. *Roberts* v. *Cooper*, 20 How. 467, 481, 15 L. ed. 969. 'There would be no end to a suit if every obstinate litigant could, by repeated appeals, compel a court to listen to criticisms on its opinions, or speculate on chances from changes in its members.'"

Other cases in which the doctrine of "the law of the case" was applied are:

> Eighth Circuit Court of Appeals, *Mutual Reserve Fund Life Assn.* vs. *Ferrenbach*, 144 Fed. 342, 343.
>
> Fourth Circuit Court of Appeals, *Patton* v. *Texas & Pacific Railway Co.*, 95 Fed. 244.

No question is suggested in the specifications of error or in the argument made in the brief of the plaintiff in error which in any manner distinguishes the present case from that heretofore determined by this court. The constitutional questions suggested to the court below, but not referred to in the specifications of error or in the carrier's brief, do not constitute such a change in the question involved. These constitutional questions could have been availed of for the purpose of taking the case directly to the Supreme Court, but this was not done nor was there any specification of error based upon any of these questions.

For the purposes of this case these constitutional questions may be assumed to have been abandoned. Nothing therefore remains but the question admitted to be the sole question of the case by the plaintiff in error, which question is foreclosed by the decision of this court in the former case, 229 Fed. 927.

Wherefore, it is respectfully submitted that the judgment of the lower court should be affirmed.

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